Florida State University Law Review

Volume 5 | Issue 3 Article 4

Summer 1977

The Challenge to Occupational Licensing Laws for Funeral Directors by Direct Cremation Businesses: An Examination and Proposed Solution

Mark J. Bradley

THE CHALLENGE TO OCCUPATIONAL LICENSING LAWS FOR FUNERAL DIRECTORS BY DIRECT CREMATION BUSINESSES: AN EXAMINATION AND PROPOSED SOLUTION

MARK J. BRADLEY*

TABLE OF CONTENTS

		PAGE
I.	INTRODUCTION	381
II.	A PERSPECTIVE ON OCCUPATIONAL LICENSING	383
III.	CURRENT LAWS REGULATING OCCUPATIONS INVOLVED WITH THE DISPOSITION OF DEAD HUMAN BODIES	387
IV.	CHALLENGES TO THE STATUS QUO	391
	A. The Challenge in California	391
	B. The Challenge in Florida	399
V.	PROPOSED SOLUTIONS	411
VI.	CONCLUSION	421
	A. The Courts as a Forum for Resolution	412
	B. The Legislature as a Potential Forum for Resolution	415
	C. A Proposed Solution	416

I. INTRODUCTION

The refrain has become common that in this world the only things certain are death and taxes.[1] Of almost equal certainty in our society is the existence of numerous occupational groups ready to assist us in dealing with these and other less inevitable eventualities. A variety of professionals offer to ease the burden of coping with that one inevitable, taxes. By contrast, modern history has produced only two occupations—funeral directors and embalmers—whose members come forward on the occasion of that other inevitable, death, and offer to perform the variety of tasks associated with the prompt, sanitary, and dignified disposition of the dead.

That these two occupations are assumed to be the sole providers of an essential, quasi-public service is reflected in state occupational

* Member, Wisconsin Bar. Associate, Tuchscherer Law Offices, Wausau, Wisconsin. B.A., University of Wisconsin-Madison, 1972; J.D., University of Wisconsin, 1977.

The author is grateful to Professor Gerald Thain of the University of Wisconsin Law School faculty for his generous supervision of this research and helpful critique of the manuscript.

1. "Our Constitution is in actual operation; everything appears to promise that it will last; but in this world nothing is certain but death and taxes." Letter from Benjamin Franklin to M. Leroy (1789), *quoted in* J. BARTLETT, FAMILIAR QUOTATIONS 423a (14th ed. 1968).

licensing laws. Such statutes generally require that no one engage in removing and preparing dead human bodies for burial or other disposition for compensation unless he or she is licensed as a funeral director or embalmer.[2]

There are indications, however, that these assumptions about who will and who should perform post-death activities may no longer be valid. Within the last two decades American attitudes toward funerary practices have changed.[3] The most noteworthy of these changes is the gradual, yet appreciable, increase in the number of cremations performed in lieu of the more traditional earth burial,[4] and the number performed without accompanying funeral or religious services.[5]

An adjunct to these changes has been the appearance, beginning in 1971 in California and in 1973 in Florida, of business operations run by individuals not licensed as funeral directors that offer to perform simple disposition of dead human bodies without embalming and

2. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 7617, 7641 (West 1975); WIS. STAT. §§ 156.04, 156.05 (1974).

In common parlance the terms funeral director and embalmer are used interchangeably. There is, however, a difference in definition, particularly with respect to licensing. A funeral director generally serves the public in all aspects of funeral service except embalming. When a death occurs, the funeral director's services include: removing the deceased to a funeral home; completing and filing a death certificate; obtaining a burial or transportation permit; preparing newspaper funeral notices; arranging for a clergyman or other person to officiate at the funeral; contacting casket bearers; arranging for the selection of cemetery space or the opening of a grave in a family plot; or if final disposition is to be cremation, securing permits and making arrangements with the crematory; at times serving as a counselor to the family; arranging and assisting in the conduct of the funeral service; and providing for the transportation of the body to the place of final disposition. After the service, the funeral director assists the family in filing necessary claims for Social Security, veterans' and union benefits, and insurance. In addition to these services, the funeral director provides certain goods, such as burial clothing, a casket, registration books, and memorial cards.

An embalmer, on the other hand, is licensed to prepare the body of the deceased for a funeral and burial. He does so by first washing and cleansing the entire body, giving particular attention to the hands, face and hair. The actual embalming process involves making an incision in the vascular system of the body and injecting preserving chemicals, under controlled pressure, through an artery. The body fluids are then removed through a vein. During this process the arms and facial features are set in the positions they will retain when the embalming process is completed. The embalmer next performs necessary restorative work, using special wax and other materials. The body is then dressed and cosmetics are applied to the hands and face.

3. *See* R. FULTON, A COMPILATION OF STUDIES OF ATTITUDES TOWARD DEATH, FUNERALS AND FUNERAL DIRECTORS (1971).

4. In 1971 there were 92,251 cremations in the United States. The largest number of these took place on the West Coast, in Florida, and in large metropolitan areas. IRION, *To Cremate or Not*, in CONCERNING DEATH: A PRACTICAL GUIDE FOR THE LIVING 239, 245 (E. Grollman ed. 1974).

5. National Funeral Directors Association, Death Notice Study, 1958–1975 (Milwaukee, Wis., Dec. 31, 1975).

without funeral or religious services.[6] Essentially these businesses offer to remove or arrange for the removal of the body from the place of death, keep it in a refrigeration facility until a death certificate is filed and a cremation permit is obtained (usually a matter of days), cremate or arrange for the cremation of the body, and dispose of the cremated remains according to the family's instructions.

Not long after these simple disposition, or, as they prefer to be called, direct cremation businesses emerged, their existence was challenged by the state licensing authorities responsible for regulating activities involving the disposition of the dead. Those offering direct cremation services objected to any regulatory attempts by a "State Board of Funeral Directors and Embalmers," on the basis that their activities included neither the directing of funerals nor the embalming of bodies. In other words, they maintained that they represented a new occupational activity: one peripheral to what has been traditionally conceived of as the funeral directing occupation, but not encompassed by it. The state boards responded that, although the direct cremation businesses were not actually conducting funerals or embalming bodies, they were still performing a number of related functions for which the law requires a license. The boards maintained that all functions related to the care and preparation of dead human bodies for disposition, by any means, have been declared by their legislatures to be within the sole purview of the licensed funeral service profession.

The conflicts which have surfaced in California and Florida illustrate several aspects of a critical problem which is certain to confront other states in their regulation of funerary and disposition practices.[7] The problem can be stated in the form of a thematic question: *To what extent can and should states regulate the activities of nonlicensed individuals who seek to perform basic functions of a licensed occupation which, when taken alone, do not constitute the generally accepted practice of that occupation?* A brief overview of occupational licensing in general will provide a context within which to conduct the analysis of this question, and place the answer.

II. A Perspective on Occupational Licensing

Laws regulating the activities of many professions and occupations whose members provide services to the public exist in each of the United States. These laws are commonly referred to as licensing laws since their primary regulatory force lies in the requirement that to engage lawfully in the activity, one must satisfy a series of prescribed

6. *See* Section IV *infra.*
7. *See* note 194 *infra.*

criteria and obtain a license.[8] Before engaging in an examination of the particular licensing laws that regulate occupations involved with the disposition of dead human bodies, it would be helpful to gain a perspective on occupational licensing in general by taking a brief look at its origins and growth in the United States, the contents of a typical licensing statute, the purposes and effects of licensing, and significant challenges that have been made to particular licensing systems.

At one time, with a few exceptions, only the professions of medicine and law were licensed.[9] In the latter half of the nineteenth century, other occupational groups organized professional societies and associations, and they too demanded licensing regulation in the hope of sharing in the status awarded to the "learned professions."[10] These efforts began to bear fruit around the turn of the century, and from 1906 to 1935 a veritable deluge of licensing legislation was enacted nationwide. Today, there are more than 100 separate occupations licensed in the United States.[11]

States enact licensing laws by authority of their police power. This power, derived by each state from its constitution and from the United States Constitution, is founded on the inherent right of a government to protect its citizens and provide for the good order of society, within constitutional limits.[12] These limits have been interpreted by the courts as being subject to the general qualifications that a regulation is valid if it is reasonable, and can be justified as being essential to the public health, safety, and general welfare.[13] It would appear that the word "essential" has been given expanded meaning by state legislators who have seen fit to extend the range of licensing regulation (or recognition)

---

8. M. CARROW, BACKGROUND OF ADMINISTRATIVE LAW 1, 66 (1948).

9. COUNCIL OF STATE GOVERNMENTS, OCCUPATIONAL LICENSING LEGISLATION IN THE STATES 21 (1952). For an historical account of licensing in the medical profession, see R. SHRYOCK, MEDICAL LICENSING IN AMERICA (1967); Rayack, *Restrictive Practices of Organized Medicine*, 13 ANTITRUST BULL. 659 (1968). For an historical account of licensing in the legal profession, see Comment, *The Unauthorized Practice of Law by Laymen and Lay Associations*, 54 CALIF. L. REV. 1331 (1966); Comment, *Legal Paraprofessionals and Unauthorized Practice*, 8 HARV. C.R.-C.L. L. REV. 104 (1973); Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. C.R.-C.L. L. REV. 301 (1970).

10. *See* COUNCIL OF STATE GOVERNMENTS, OCCUPATIONAL LICENSING LEGISLATION IN THE STATES 20–22 (1952).

11. COUNCIL OF STATE GOVERNMENTS, OCCUPATIONAL AND PROFESSIONAL LICENSING BY THE STATES, PUERTO RICO AND THE VIRGIN ISLANDS 2–8 (1968).

12. *E.g.*, Ziffrin, Inc. v. Martin, 24 F. Supp. 924 (E.D. Ky. 1938), *aff'd sub nom.* Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); McKay Jewelers v. Bowron, 122 P.2d 543 (Cal. 1942); Sowma v. Parker, 22 A.2d 513 (Vt. 1941).

13. Providence Journal Co. v. McCoy, 94 F. Supp. 186 (D.R.I. 1950), *aff'd*, 190 F.2d 760 (1st Cir., *cert. denied*, 342 U.S. 894 (1951); *Ex parte* Rameriz, 226 P. 914 (Cal. 1924).

from occupations for which the need to protect the public health, safety, and welfare seems readily apparent, such as doctors, dentists, nurses, and optometrists, to those for which the need is not so apparent, such as ordinary trades.[14]

Most licensing laws are modeled after the acts regulating the medical and legal professions, and hence are similar in content. Typically, each statute establishes a governmental licensing agency, describes the composition of its board and the means of selecting its members, and specifies the status of the agency (whether it is an independent board or part of a department of state government) and its jurisdiction.[15] The law also specifies the minimum personal qualifications (age, residence, citizenship, character) and educational qualifications (course requirements, completion of an approved program, experience, examinations, etc.) for entrance into the occupation.[16] A definition of "practice" sets forth the authorized scope of functions for the occupation.[17] Also specified are conditions for the renewal of a license, guidelines and procedures for suspension, revocation and reinstatement of a license, and provisions for recognition of licenses from other states.[18] Licensing gives a person legal authority to engage in a specified occupation; without such authority the person could be fined or imprisoned.[19]

State legislatures have enacted licensing statutes to provide certain benefits to the consuming public. One such benefit is the assurance that only those who have demonstrated a certain level of competence can enter an occupation. Additional benefits include maintenance of a high quality of service and protection of consumers from fraud and dishonesty. Further, individuals who believe themselves wronged by

14. In its report on occupational licensing in the United States cited in note 11, the Council of State Governments listed twelve licensed occupations pertaining to the fields of health and medicine. The twelve are part of a core of twenty-two occupations which nearly all states license, the remainder being licensed by far fewer states. Minnesota, for example, licenses boxing promoters, MINN. STAT. ANN. § 341.13 (West 1977 Supp.); and fur farmers, *id.* § 17.35. Swine dealers are licensed in Iowa, IOWA CODE ANN. § 163.30 (West 1977 Supp.); as are tattoo artists in Hawaii, HAW. REV. STAT. § 321-14 (1975 Supp.); lightning rod salesmen in New Hampshire, N.H. REV. STAT. ANN. § 323 (1968); sprinkler and irrigation fitters in Utah, UTAH CODE ANN. § 58-32 (1953); hunting guides in Wyoming, WYO. STAT. § 23-55 (1947); and hypertrichologists (removers of excess facial hair) in Connecticut, CONN. GEN. STAT. ANN. § 20-270 (West 1977 Supp.).

15. *See, e.g.*, FLA. STAT. §§ 470.02, .04 (1975). Chapter 470, Florida Statutes, the funeral directors and embalmers law, is one of Florida's many licensing statutes repealed—at least potentially—by the so-called "Sunset law." Regulatory Reform Act of 1976, ch. 76-168, 1976 Fla. Laws 295. See text accompanying notes 188-193 *infra* for a discussion of this act.

16. *See, e.g.*, FLA. STAT. § 470.08 (1975).

17. *See, e.g., id.* § 470.01(2)-(4).

18. *See, e.g., id.* §§ 470.10, .12, .13, and .35.

19. *See, e.g., id.* § 470.21.

a licensee's poor service or sharp dealings may be able to gain redress more simply and inexpensively through the administrative procedures of a state regulatory agency or licensing board, than by resort to the judicial system.

The expressed purpose of a licensing system is to protect the public interest, specifically the public health, safety, and general welfare. Yet licensing legislation is seldom the result of public demand. More often it results from the efforts of an occupational group seeking the benefits of sanctioned restraints on competition. Typically, members of an occupation organize into an association and participate in the drafting of a licensing law that is introduced in the state legislature. They argue that public harm will result if the occupation is not regulated. Critics of licensing legislation suggest that self-interest, not public interest, motivates such moves.[20]

State licensing boards, or the administrative bodies established by licensing statutes to oversee the regulatory process, are typically controlled by members of the occupation.[21] In effect, licensing is sanctioned self-regulation. This practice is justified by assertions that only experienced practitioners with demonstrated knowledge and ability can adequately judge the abilities of their colleagues and establish appropriate performance standards. Yet licensing boards can become very effective tools for dealing with price cutters or other practitioners whose conduct is deemed unfair or unethical by members of the occupation but not necessarily by the general public.[22] Board members usually have wide latitude in interpreting eligibility requirements for admission to practice, setting fee schedules and recommending prices, preparing exams, and engaging in other activities that may serve to exclude would-be practitioners.[23]

One author describes the reasoning behind many board decisions as "what is good for our profession is good for the community,"[24] a position which disregards the implications these decisions may have for other participants in the free-market system. One group of partici-

20. For excellent scholarly treatment of occupational licensing systems, *see* M. FRIEDMAN, CAPITALISM AND FREEDOM (1962); W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS (1956); and J. LIEBERMAN, THE TYRANNY OF THE EXPERTS (1970).

21. *See, e.g.*, CAL. BUS. & PROF. CODE § 7602 (West 1975) (board members, except for three public members, are required to be licensed funeral directors or embalmers with five years of professional experience); FLA. STAT. § 470.02(1) (1975) (board members must be practicing and licensed funeral directors and embalmers with five years experience).

22. D. Wallace, *Occupational Licensing and Certification: Remedies for Denial*, 14 WM. & MARY L. REV. 46, 49 (1972).

23. B. SHIMBERG, OCCUPATIONAL LICENSING: PRACTICES AND POLICIES 1 (1973).

24. *Id.*

pants (or would-be participants excluded by certain licensing laws) includes members of peripheral occupations who hold themselves out as willing and able to do part of what a licensed profession does. Members of peripheral occupations may argue that they do not come within the same licensing requirements, or at least not to the same extent. Since the first licensing statute there has been tension, and frequently confrontation, between licensed members of an occupation and those non-licensed persons providing related services.

For the most part, when challenges have been made by peripheral service providers, the response has been that the licensed occupation is already providing that service and more, and is well regulated to protect the public health, safety, and welfare from incompetent practitioners. The following analysis of such a challenge to the licensing laws for funeral directors and embalmers will examine whether that response will or should continue to be sufficient.

III. Current Laws Regulating Occupations Involved with the Disposition of Dead Human Bodies

State laws regulating occupations involved with the disposition of the dead apply to what are commonly understood as the occupations of funeral directing and embalming. Chapters of state statutes dealing with the regulation of the disposition of human remains are generally captioned as "Funeral Directors & Embalmers," "Embalmers," "Funeral Directing," or, in the case of Delaware, "Funeral Services and Contracts."[25]

Most of these statutes define the occupational activity they regulate, but the definitions are not always clear as to what precise activities constitute practice of the licensed occupation. For example, in Idaho, the legislative expression is quite clear: "[E]very person . . . who shall engage in the profession or business of conducting funerals and supervising or directing the burial and disposal of dead human bodies, or performing any act or service connected therewith . . . shall be deemed a funeral director."[26] To clarify any lingering doubt, the licensing law provides: "It shall be unlawful for any person to engage in the business, or any part of the business of making final disposition of dead human bodies without first obtaining . . . a license therefor as herein pro-

25. *See, e.g.*, DEL. CODE tit. 24, ch. 31 (1975) ("Funeral Services and Contracts"); FLA. STAT. ch. 470 (1975) ("Funeral Directors & Embalmers"); GA. CODE ANN. ch. 84–8 (1975) ("Funeral Directors & Embalmers"); IDAHO CODE tit. 54, ch. 11 (1957) ("Embalmers"); N.Y. PUB. HEALTH LAW art. 34 (McKinney 1971) ("Funeral Directing").

26. IDAHO CODE § 54–1101(B) (1957).

vided."[27] The Kentucky statute, by contrast, is not so clear, requiring only that anyone who engages in, or attempts to engage in "funeral directing" must be licensed under the provisions of the statute.[28] The practice of funeral directing, however, is not defined.

An additional problem lies in the scope of these definitions, which varies considerably among the states. In Indiana, for example, the term "funeral directing" is defined as "the profession of conducting and directing or supervising funerals," and includes "all of such matters under any other title customarily used therefor."[29] In New York, the term means much more, including "the care and disposal of the body of a deceased person and/or the preserving, disinfecting and preparing by embalming or otherwise, the body of a deceased person for funeral services, transportation, burial or cremation."[30] Despite these variations and the occasional vagueness of some statutes, it seems apparent that they express a common, general intent of state legislatures: that only persons licensed as either funeral directors or embalmers may engage lawfully, for compensation, in any activity involving the disposition, by any means, of dead human bodies.[31]

When attack has been made upon these licensing laws, they have been sustained as a proper exercise of a state's police power to protect the public health, safety, and welfare.[32] The New York Court of Appeals' statement in *People v. Ringe* is representative:

> The care of dead human bodies, and the disposition of them by burial or otherwise, is so closely related to the health and general welfare of a community that the business of caring for and disposing of such bodies may be regulated by license and special regulation under the general police power of the state.[33]

---

27. *Id.* § 54–1101.

28. KY. REV. STAT. § 316.020 (1972).

29. IND. CODE ANN. § 63–720(d) (Burns 1974).

30. N.Y. PUB. HEALTH LAW § 3400(d) (McKinney 1971).

31. Many states provide for exceptions to these licensing laws for individuals such as state officers, hospital staff, ambulance personnel performing their duties, medical school and anatomical association personnel, and individuals performing religious ceremonies. *See, e.g.*, CAL. BUS. & PROF. CODE § 7616(b) (West 1975); WIS. STAT. ANN. § 156.16 (West 1974).

32. *See, e.g.*, Keller v. State, 90 A. 603 (Md. 1914); People v. Ringe, 90 N.E. 451 (N.Y. 1910); F.E. Nugent Funeral Home, Inc. v. Beamish, 173 A. 177 (Pa. 1934); and Prata Undertaking Co. v. State Bd. of Embalming & Funeral Directing, 182 A. 808 (R.I. 1936). There have been successful attacks on the reasonableness of specific provisions of certain states' licensing laws, but the basic concept of licensing funerary operations has been held to be reasonable. For specific discussions of the validity of licensing laws for embalmers, see McKinley v. Reilly, 393 P.2d 268 (Ariz. 1964), and Louisiana State Board of Embalmers v. Britton, 154 So. 2d 389 (La. 1963).

33. 90 N.E. at 453.

One effect of the existing law is that a person seeking a license to engage in the general business of providing for the disposition of human remains must undergo instruction and training to provide traditional American funeral services. Licensees are usually required to complete at least one academic year in a professional curriculum in an accredited college of funeral service education or mortuary science.[34] The professional curriculum is generally comprised of coursework in anatomy, physiology, chemistry, bacteriology, embalming, cosmetology, and the techniques of funeral directing and funeral business management.[35] Also included is instruction in the detection of contagious diseases and laws applicable to the transportation of dead bodies.[36]

After satisfactory completion of the prescribed coursework, a prospective licensee must pass a state licensing examination, prepared and administered in most states by a board composed either entirely or primarily of licensed funeral directors.[37] A final requirement for licensure is a period of internship or apprenticeship with a licensed funeral director, ranging from one to three years in length.[38]

The majority of state licensing laws also impose requirements concerning the physical facilities maintained by a funeral business. These requirements are imposed to ensure proper embalming services.[39] For example, the Michigan statute provides that a "funeral establishment must contain a preparation room equipped with tile, cement or composition floor, necessary drainage and ventilation, and containing necessary instruments and supplies for the preparation and embalming of dead human bodies for burial, transportation or other disposition."[40]

---

34. *See, e.g.*, CAL. BUS. & PROF. CODE § 7643(e) (West 1975). This requirement was upheld in Beard v. State Bd. of Embalmers & Funeral Directors, 295 P. 1052 (Cal. Dist. Ct. App. 1931). Florida requires, *inter alia*, that an applicant for licensure complete the "required course in mortuary science in a school approved by the board." FLA. STAT. § 470.08(1)(e) (1975).

35. *See, e.g.*, FLA. STAT. § 470.08(1)(e) (1975).

36. *See, e.g.*, CAL. BUS. & PROF. CODE § 7622 (West 1975).

37. *See, e.g.*, FLA. STAT. §§ 470.02, .09 (1975). The validity of legislation requiring an examination as a prerequisite to engaging in funeral directing or embalming has been upheld in State Bd. of Funeral Directors & Embalmers v. Cooksey, 3 So. 2d 502 (Fla.), *modified on other grounds and rehearing denied*, 3 So. 2d 502, 508, *adhered to on rehearing*, 4 So. 2d 253 (Fla. 1941); in People v. Harrison, 156 N.Y.S. 679 (N.Y. App. Div. 1915); and in Commonwealth v. Markham, 174 A. 6 (Pa. 1934).

38. *See, e.g.*, FLA. STAT. § 470.08(1)(e) (three years internship required); and WIS. STAT. ANN. § 156.045(f) (West 1973) (one year apprenticeship required). There is some conflict indicated by the cases on the constitutionality of the extensiveness of some state's apprenticeship requirements, but the concept itself has been upheld in, *e.g.*, Vaughn v. State Bd. of Embalmers & Funeral Directors, 82 S.E.2d 618 (Va. 1954); and in State Bd. of Funeral Directors & Embalmers v. Cooksey, 3 So. 2d 502 (Fla. 1941).

39. A similar conclusion is stated in A. STREET, MORTUARY JURISPRUDENCE 18 (1948) [hereinafter STREET].

40. MICH. COMP. LAWS ANN. § 338.869 (1976).

The language in the Texas statute is somewhat more explicit, requiring "[a] preparation room that is secluded from the public, properly ventilated, and containing an operating table, sewer facilities, hot and cold running water, and sufficient instruments and chemicals to embalm a dead human body."[41] A number of states also require that a funeral establishment contain a casket display room, a funeral chapel, and a hearse or funeral coach.[42]

The responsibility for regulating activities involving the disposition of dead bodies is usually given to a state board empowered to promulgate rules and regulations under state licensing statutes.[43] As stated previously, the membership of these boards is comprised entirely or primarily of licensed funeral directors and embalmers. In a 1936 opinion, the Rhode Island Supreme Court upheld the practice of limiting board membership to funeral directors and embalmers.[44] In expressing the standard justification for such peer control, the court said it was reasonable and proper for the board to be composed entirely of funeral service practitioners because of the highly specialized nature of the business.[45] Notwithstanding the court's statement, there is little question that, as the designated agencies for the control of individuals involved with the disposition of the dead, the state boards have exercised some influence in the restriction of competition for the market.[46]

The primary public policy purposes of funeral director and embalmer licensing laws are to safeguard the public health and to protect the public from commercial exploitation and deception by incompetent and unscrupulous practitioners.[47] Indeed, in seeking professional licensure, funeral director trade associations advocated the inclusion of codes of ethical practice in state licensing statutes to assure their clientele of the "high personal character and the good moral standards of their members."[48] A secondary, but important, policy purpose behind funeral director and embalmer licensing laws is to limit the handling of dead bodies to those who may be depended upon to discover life in a supposedly dead body, and to detect and disclose to the proper police

---

41. TEX. REV. CIV. STAT. ANN., art. 4582b, § 4(c)(5) (Vernon 1976).

42. R. HABENSTEIN & W. LAMERS, THE HISTORY OF AMERICAN FUNERAL DIRECTING 555 (1972) [hereinafter HABENSTEIN & LAMERS].

43. *See, e.g.*, CAL. BUS. & PROF. CODE § 7606 (West 1975); FLA. STAT. § 470.04 (1975).

44. Prata Undertaking Co. v. State Bd. of Embalming & Funeral Directing, 182 A. 808 (R.I. 1936).

45. *Id.* at 813.

46. HABENSTEIN & LAMERS, *supra* note 42, at 554.

47. See cases cited in note 32 *supra* and accompanying text.

48. HABENSTEIN & LAMERS, *supra* note 42, at 447.

authorities physical indications that a person's death may have been criminally caused.[49]

Additional practical goals exist here as in all occupational licensing systems. One purpose behind funeral directors' and embalmers' advocating licensure initially was to achieve the status and recognition accorded other "professionals."[50] In their book on the history of American funeral directing, Robert Habenstein and William Lamars made the following observation:

> The burden of this legislation goes beyond the stipulation of requirements for licensure; a somewhat ill-formed, but nevertheless recognizable image of the practitioner and the service he performs orients this legislation: the image of the funeral home, serving the community, "home operated" by a small number of skilled practitioners who dedicate all their vocational efforts to this task on a full time basis.[51]

The same authors conclude that "[l]icensing legislation . . . has had the effect of setting up standards of competence and performance, as necessary to the public health and welfare of the community as to the funeral directing profession itself."[52]

IV. Challenges to the Status Quo

A. The Challenge in California

In early 1971, California State Senator James R. Mills of San Diego requested a legal opinion from the state attorney general as to whether an entity which was not licensed as a funeral director could, for a reasonable charge, arrange for the cremation of a deceased human body and the disposal of the ashes at sea. Senator Mills specified that the entity would not take part in preparation of the remains for disposition nor maintain a funeral establishment, and that its activities would be limited to removing the body from the place of death, obtaining necessary disposition permits, causing cremation of the body, and distributing the cremains at sea. In his responding opinion, the Attorney General stated that the hypothetical entity proposed by the Senator would not require a funeral director's license because its activities would include only one of three tasks specified in the California statutes as constituting the practice of funeral directing.[53]

---

49. Street, *supra* note 39, at 11.
50. Habenstein & Lamers, *supra* note 42, at 448–49.
51. *Id.* at 554.
52. *Id.*
53. Informal letter opinion of the California Attorney General to Senator James R.

The Attorney General's opinion was welcome news to three of Senator Mills' constituents who for almost a year had been planning the operation of a business identical to the "hypothetical entity" the Senator described. Relying on the Attorney General's opinion, the three (a bio-chemist, an attorney, and an advertising executive), none of whom was licensed as a funeral director, founded the Telophase Society—the first direct cremation business in the United States.[54]

Soon after the Telophase Society had begun operating, the State Board of Funeral Directors and Embalmers, an agency of the California Department of Consumer Affairs, received numerous complaints from funeral directors in San Diego County that Telophase was operating without a license from the Board.[55] These complaints and the Attorney General's opinion mentioned above prompted several meetings between officials of the State Board and representatives of the California Funeral Directors Association, a trade association of practicing funeral directors and embalmers, to discuss the issue of Telophase's nonlicensure. The primary concern of both groups was that according to the Attorney General's opinion, one could be engaged in disposing of dead human bodies and not be subject to the laws which were designed to regulate such activities.[56] As a result of these meetings, the Board and the Association decided that because the Attorney General's opinion had been based on an interpretation of an existing statute as it applied to the ongoing activities of Telophase, the proper course of action would be to seek a legislative remedy by requiring operations such as Telophase to obtain a license and thereby fall under the jurisdiction of the Board.[57]

Mills (Mar. 5, 1971). The statutory language interpreted by the Attorney General provided:

> A funeral director is a person, partnership, association, corporation or other organization engaged in or conducting, or holding himself or itself out as engaged in *each* of the following:
>
> (a) Preparing for the burial or disposal, and directing and supervising for burial or disposal of dead human bodies.
>
> (b) Maintaining a funeral establishment for the preparation for the disposition or for the care of dead human bodies.
>
> (c) Using, in connection with his or its name or funeral establishment, the words "funeral director," or "undertaker," or "mortician," or any other title implying that he or it is engaged as a funeral director.

Act of Sept. 19, 1939, ch. 39, § 1, 1939 Cal. Stats. 412 (amended 1974) (emphasis supplied by Attorney General).

54. Letter from Tom Sherrard, attorney for the Telophase Society, to the author (Aug. 7, 1975). Telophase was named for the final state in mitosis—the division of living cells.

55. Telephone interview with David T. Buck, Executive Secretary, California Bd. of Funeral Directors & Embalmers (Aug. 5, 1975).

56. *Id.*

57. *Id.*

Officials of the Board then drafted, in consultation with representatives of the Association, a bill that was introduced in the California Senate in March, 1972. The bill sought to change the statutory definition of "funeral director" to include any person or organization "engaged in or holding himself or itself out as engaged in the preparing for the burial or disposal, or directing or supervising the burial or disposal of dead human bodies."[58] The bill further provided that no person would be permitted to act as a funeral director or use in connection with his name or business any title implying that he was engaged as a funeral director unless he had obtained a funeral director license from the Board.[59] Finally, it required every funeral director to maintain a "funeral establishment,"[60] a term which was defined in the existing statutes as including "a chapel in which funeral or other religious services may be conducted," and a "preparation room equipped with a sanitary flooring and necessary drainage and ventilation and containing necessary instruments and supplies for the preparation and embalming of human dead bodies for burial or transportation."[61]

The proposed requirement that the newly defined "funeral director" maintain a "funeral establishment" was prompted by two considerations. First, Telophase had been engaging in an activity that had not been included in the description of Senator Mills' "hypothetical entity," upon which the Attorney General's 1971 opinion was based. While waiting for the death certificate to be signed by the attending physicians and the cremation permit to be processed by the county health department (usually a matter of one or two days, but sometimes as long as a week), Telophase had been storing the body at what it termed a "holding station."[62] The Board considered

58. Cal. S. 616, § 1 (1972).

59. *Id.*

60. *Id.*

61. Act of Sept. 15, 1945, Ch. 830, § 1, 1945 Cal. Stats. 1529 (current version at CAL. BUS. & PROF. CODE § 7616 (West 1975)).

62. According to signed affidavits submitted as part of the plaintiff's pleadings in Department of Consumer Affairs v. Telophase Soc'y, No. 336679 (San Diego Super. Ct. Dec. 4, 1972), the first holding station used by Telophase was a one-room, concrete block structure with a garage door, located in a primarily residential area at the rear of a building used by another business. The room was about 10 feet square and had a cement floor with a hole in one corner from which plumbing had been removed. When bodies were delivered to the room, they were placed in either plywood or cardboard boxes with lids on them and either covered with a disposable sheet or left uncovered. The room was not refrigerated and bodies held for several days produced a pungent odor in the room and surrounding area. To alleviate this problem, dry ice was sometimes packed on the bodies to help preserve them, but with little effect.

The use of this holding station caused a controversy between the residents of the area and Telophase. On several occasions neighbors of the holding station accosted the ambulance personnel who were delivering bodies and demanded an explanation of

this practice to be within the nature of activities for which the legislature intended regulation for the purpose of protecting the public health.[63] A second consideration was the desire on the part of the California Funeral Directors Association to prevent a business such as Telophase from existing without maintaining conventional funeral service facilities.[64]

Throughout its six month life, the bill sponsored by the Board and the Association was enveloped in controversy. The news media were quick to point out that the bill had been introduced by a state senator investigated by a grand jury two years previously for allegedly accepting a $5,000 campaign contribution from the California Funeral Directors Association.[65] (The investigation was dropped for lack of evidence.) The Senator openly admitted that his bill was aimed at the Telophase Society because, in his opinion, Telophase did not live up to proper health standards.[66] That claim was quickly countered by a telegram to the legislature from the Director of Public Health for San Diego County, who said he "endorsed unqualifiedly the whole operating procedure of the Telophase Society."[67]

Telophase mounted a vigorous lobby against the bill, claiming that the California funeral industry was trying to protect its business monopoly by eliminating from the market a lower-priced alternative to traditional funeral service.[68] This argument was supported editorially

what they were doing. The ambulance personnel were instructed by Telophase officials not to respond to these inquiries. The controversy grew until the owner of the building in which the holding station was located received a threat that the building would be bombed unless the body storage operation was removed. After failing in its attempts to negotiate with the residents, Telophase abandoned the location and moved its storage operation to a different building.

This second holding station was a garage-type structure into which an ambulance or the Telophase station wagon was driven. In a corner of the garage was a used beer cooler which had been converted into a refrigeration unit for holding the bodies which had been placed in either plywood or cardboard boxes. There was a leak in the cooler's refrigeration system, and at times water dripped onto the boxes which were stacked on the floor below. Some of the boxes became soaked with water and when lifted, buckled in the middle from the weight of the body inside. The odor of decaying bodies became distinct both in the cooler and in the room inside the garage.

63. Telephone interview with David T. Buck, Executive Secretary, California Bd. of Funeral Directors & Embalmers (Aug. 12, 1975).

64. BUS. WEEK, Aug. 12, 1972, at 31.

65. *See, e.g.*, Los Angeles Times, Aug. 1, 1972, § I, at 3, col. 5.

66. BUS. WEEK, Aug. 12, 1972, at 31.

67. *Id.*

68. Letter from Tom Sherrard, attorney for the Telophase Society, to the author (Aug. 7, 1975). The cost of Telophase service included a $15.00 membership fee and a payment of $250.00 at the time of death, for a total of $265.00. Telophase claimed that the cost of an average adult funeral and burial in the San Diego area at that time was $1,800. The comparison Telophase frequently made between these two figures was somewhat misleading because the services purchased by each were not comparable.

by much of the news media, including the Los Angeles Times.[69] For its part, the California Funeral Directors Association persuaded its members to back the campaign against Telophase by implying that if not stopped, the threat it represented to traditional funeral service might spread statewide from its modest storefront home in San Diego.[70]

The bill had managed to pass both houses of the legislature and was back in the Assembly for consideration of minor amendments when it ran into unexpected opposition. Several representatives began to speak out against the bill, saying it smacked of monopoly.[71] This opposition was picked up by vocal California consumers who wrote outraged letters to their representatives.[72] Fearing certain defeat if the bill were to come to a vote, the bill's proponents invoked an unusual parliamentary procedure and had it placed in an "inactive file."[73]

After failing to achieve a legislative remedy to the problem of Telophase's nonlicensure, the State Board and the California Funeral Directors Association began laying the foundation for an attempted judicial remedy. As a first step, the Board sought to determine whether the Attorney General's 1971 opinion would be different for an operation also engaged in holding bodies pending final disposition.[74]

In his response the Attorney General characterized the question as not whether the activities of Telophase constituted the practice of funeral directing (the question he had answered in 1971), but whether Telophase's holding stations could be construed as "preparation rooms" as defined in section 7616 of the state's Business and Professions Code. The Attorney General said one intention of the legislature in enacting section 7616 was "to prohibit the operation of a preparation room wherein human dead bodies are prepared and embalmed for *burial* or *transporation* without enforcement, in the interest of public health, safety and welfare, of the appropriate regulatory safeguards by the Board of Funeral Directors and Embalmers."[75] Therefore, the Attorney

---

A more accurate comparison would have been between the Telophase price and what a funeral director would charge to perform the same services.

69. Los Angeles Times, Aug. 2, 1972, § II, at 6, col. 1.

70. BUS. WEEK, Aug. 12, 1972, at 31.

71. *Id.*

72. Ironically, most of the letterwriters mistakenly thought the bill was aimed at restricting memorial societies, which negotiate fees with licensed funeral directors for their services. *Id.* at 32.

73. Los Angeles Times, Aug. 4, 1972, § I, at 3, col. 1.

74. Letter from David T. Buck, Executive Secretary, California Bd. of Funeral Directors & Embalmers, to Evelle J. Younger, California Attorney General (Sept. 7, 1972).

75. Informal letter opinion of the California Attorney General to David T. Buck, Executive Secretary, California Bd. of Funeral Directors & Embalmers, (Oct. 6, 1972) (emphasis added).

General concluded that no entity could maintain such a room without licensure by the Board. While noting that the term "preparation" was not defined in the statutes, the Attorney General declared it should be interpreted broadly. He said, "[I]t would appear that the mere acts of dressing, wrapping, and/or containerizing human dead bodies could be construed as acts of preparing for burial or transportation."[76]

This language satisfied the Board that as long as Telophase maintained its holding stations it could not operate without a funeral director's license. Accordingly, the Board, in cooperation with the Department of Consumer Affairs, sought a preliminary and permanent injunction against Telophase.[77]

At the hearing on the motion for an injunction, the Attorney General, representing the Board, argued that in wrapping a dead body or placing it in a box for storage in a refrigerated facility, Telophase was "preparing" the body for its subsequent transportation to the crematory. He argued further that Telophase's actions constituted the preparation of dead bodies for subsequent burial of the cremains. It was the State's position that the legislation pertaining to a "preparation room" was intended to apply not only to rooms used for embalming and other activities related to the preparation of a body for viewing by either relatives or the public, but also to rooms used for preparing a body in any manner for burial and/or transportation.[78]

Attorneys for Telophase argued in response that the term "preparation room" referred to a place in which a body is embalmed and prepared for the public ceremony of a funeral.[79] Telophase's holding stations, they claimed, were not rooms in which preparation of bodies took place in the commonly understood sense of modifying their appearance. Instead, defense counsel urged, these holding stations were simply stop-off points in Telophase's direct cremation service, necessitated by the time it took to secure the certificates and permits required by law before cremation could be performed. This holding activity, Telophase argued, was not intended by the legislature to be included within the meaning of "preparation" as used in section 7616.[80]

The court held that the Legislature had intended that a preparation room be the "situs of much more sophisticated activity" (such as embalming or cosmetic preparation) than the mere "handling, en-

---

76. *Id.*

77. Complaint, Department of Consumer Affairs v. Telophase Soc'y, No. 336679 (San Diego Super. Ct. Dec. 4, 1972).

78. Reporter's Transcript at 27.

79. Department of Consumer Affairs v. Telophase Soc'y, No. 336679, slip. op. at 2 (San Diego Super. Ct. Dec. 4, 1972).

80. Reporter's Transcript at 18–20.

shrouding and boxing" engaged in by Telophase.[81] In support, the court cited regulations pertaining to preparation rooms which were promulgated by the State Board, in which the Board referred to preparation rooms alternatively as embalming rooms and required each such room to be equipped with an embalming table, body drain tubes, needles, scalpels, hemostats, syringes, cosmetics, wax, and an embalming machine.[82] Telophase, the court said, neither needed nor would use this equipment in its holding operation.[83]

In denying the Board's motion for an injunction against Telophase, the court said there was no question that the Legislature *could* require a license from all persons who prepare dead bodies for burial or disposal, but that it had not done so.[84] "Perhaps," concluded the court, "[the legislature] will find a solution whereby the public interest can be served by licensing those who prepare dead bodies without requiring them to install unneeded equipment or unnecessary facilities."[85] This language may well have prompted the Board and the California Funeral Directors Association to renew efforts to obtain a legislative remedy.

A bill was introduced in the 1973 session of the California Legislature which proposed changes in several provisions in the existing funeral directors and embalmers law to bring Telophase and other similar operations within the funeral director licensing requirements.[86] Instead of requiring a funeral director's license for one who performed "each" of three specified activities, as did the existing law,[87] the bill would require a license for someone who engaged in "any" of the three.[88] Preparation of dead bodies for transportation became a function of the funeral director, as did the preparation of dead bodies for burial or disposal.[89] Likewise, a funeral director became one who maintained an "establishment," as opposed to a "funeral establishment," for the preparation for the transportation or disposition of dead human bodies.[90] A "suitable room for the storage of dead human bodies" was substituted as a requirement in an establishment rather than a chapel for funeral or religious services.[91] Finally, a "preparation

81. Slip op. at 3.
82. *Id.*
83. *Id.*
84. *Id.* at 2.
85. *Id.* at 4.
86. Cal. A. 1828 (1973).
87. *See* note 53 *supra.*
88. Cal. A. 1828, § 1 (1973).
89. *Id.* § 2.
90. *Id.*
91. *Id.* § 3.

room" became a room properly equipped for the preparation, "sanitation," or embalming of dead bodies for burial or transportation.[92]

The battle over this second bill was less heated than that waged over the one introduced the year before, but for the most part the arguments were the same. There were, however, two points articulated by the proponents of the second bill, both of which stressed consumer protection. One concerned the handling of the membership fees which Telophase collected in return for a reduced charge for removal and cremation at the time of death.[93] Similar arrangements for the services of funeral directors, called pre-need trust agreements, were already strictly regulated under the funeral directors and embalmers law to ensure no misuse of funds.[94] Those favoring licensure for Telophase argued that if it were not licensed, the state would have no effective means for protecting consumers against misuse of funds. A second argument was that without licensure of operations such as Telophase, the State Board did not have the power to investigate and verify the complaints which had been received concerning some of the Telophase business solicitation techniques[95] and its alleged mistreatment of dead bodies.[96] Even if the complaints were verified, without licensure Telophase would not be subject to the Board's disciplinary powers.

These arguments and a strong lobby by the California Funeral Directors Association seem to have made the difference. The 1973 bill

---

92. *Id.*

93. *See* note 68 *supra.*

94. Act of July 15, 1965, ch. 1414, § 1, 1965 Cal. Stats. 3331 (currently codified at CAL. BUS. & PROF. CODE § 7735 (1975)).

95. The California Business and Professions Code prohibits a funeral licensee or his representative from soliciting business after a death or while death is impending. CAL. BUS. & PROF. CODE § 7694 (West 1975). The Code also makes it a misdemeanor for a licensee or his representative to pay or offer to pay any sum of money for the securing of business. *Id.* § 7716. Numerous funeral directors complained to the Board that Telophase representatives were selling membership plans to people who desired to take advantage of the reduced service charge at the time of death. This activity was directed primarily at convalescent hospitals, retirement villages, and nursing homes. In at least one instance, Telophase offered to share the membership fee if the staff of a convalescent hospital would sell Telophase membership plans to its patients. Letter from Thomas B. Weber, President of the Telophase Society, to the Ocean View Convalescent Hospital, Encinitas, California (Apr. 2, 1971).

96. In April, 1972, an official of a convalescent hospital in El Cajon, California, filed a complaint with the State Board regarding a Telophase employee who had come to the hospital to remove the body of a deceased patient. In addition to complaining about the employee's casual dress and rude behavior, the official said that after the body had been removed from the hospital to the Telophase station wagon, the employee asked for some tissue paper, explaining that his dog had defecated in the vehicle. Letter from Vanessa R. Nerthling, Director of Nurses, Carroll's Convalescent Hospital, El Cajon, California, to the California Board of Funeral Directors and Embalmers (April 3, 1972). *See also* note 62 *supra.*

was passed by the Senate and Assembly in 1974, was signed by the Governor, and became effective in January, 1975.[97] At that time Telophase applied for and received its funeral director's license.[98]

In February, 1975, the State Board filed amendments to its administrative regulations to implement the provisions of the new law. Regulations previously addressed to the maintenance of a preparation room were amended to include a "storage room."[99] Funeral establishments engaged solely in the disposition, without embalming, of dead human bodies were required to have, in lieu of equipment specified for an embalming room, refrigeration equipment of sufficient size to accommodate a minimum of two bodies.[100] Also, each licensed "funeral director" (the new definition included Telophase and similar operations) who entered into any "pre-need arrangement, contract or plan" was required to file with the Board annually a written, verified report pertaining to funds received and held under such contract.[101]

B. The Challenge in Florida

In a speech delivered in St. Petersburg, Florida in late 1972, the President of the State Board of Funeral Directors and Embalmers made reference to the Telophase Society's challenge to California's licensing law. The speaker informed his audience that since the funeral director licensing law in Florida contained language similar to that which was the basis of the challenge in California,[102] the Board was contemplating the need for remedial legislation to prevent similar difficulties with direct cremation services.[103]

In that audience were members of a small St. Petersburg investment group, some of whom were retired businessmen, who had become interested in what they characterized as a possible "loophole" in the Florida licensing law.[104] After discussing the subject at one of

97. Act of Sept. 27, 1974, ch. 1512, 1974 Cal. Stats. 3324 (codified at CAL. BUS. & PROF. CODE §§ 7609, 7615, 7616 (1975)).

98. Letter from David T. Buck, Executive Secretary, California Bd. of Funeral Directors & Embalmers, to the author (July 3, 1975).

99. 16 CAL. ADMIN. CODE § 1224(b) (1975).

100. *Id.*

101. *Id.* § 1269.

102. *See* FLA. STAT. ch. 470 (1975). The language referred to was § 470.01(3), which defined "funeral directing" as:

> [t]he profession of directing or supervising funerals for profit, or the profession of preparing dead human bodies for burial or cremation by means other than embalming, or the disposition or shipping of dead human bodies, or the provision or maintenance of a place for the preparation of dead human bodies.

103. Telephone interview with Charles E. Jordan, General Manager and Director, National Cremation Society (Aug. 20, 1975).

104. *Id.*

their meetings, they inquired of the Florida Attorney General whether a business such as the Telophase Society would be legal under the Florida statutes. According to a member of the group, they failed to obtain a written opinion from the Attorney General but instead spoke with a member of the Attorney General's office by phone and were told that such a business would be legal in Florida.[105]

Relying on this oral opinion, five members of the group began laying plans for a direct cremation business in St. Petersburg. Part of their preparation included a visit to California to meet with the officials of the Telophase Society and to observe their operation first-hand.[106] The group was impressed by the California model; they incorporated as the Telophase Society of Florida and opened for business in April, 1973. Telophase Society of Florida eventually became National Cremation Society.[107]

The operation of National Cremation Society was essentially the same as that of its counterpart in California, except that National had its offices, refrigeration facility, and cremation furnace all in one building. For a membership fee of $24.00 and a charge of $275.00 at the time of death,[108] National would arrange for a professional livery service to move the body of the deceased from the place of death to the National building, where the body would be placed in a cardboard box and held in a refrigeration facility for the forty-eight-hour waiting period prior to cremation required by Florida law.[109] During that time, National would process a death certificate, obtain a cremation request and permit, arrange for newspaper obituaries, and prepare and submit social security and veteran's benefit forms. The body would then be cremated at National's building and the cremains disposed of according to the family's instructions.[110]

---

105. *Id.*

106. *Id.*

107. The name change occurred in October, 1973. *Id.*

108. The charge for removal and cremation services for nonmembers is $299.00. The advantage of membership is that the quoted price of $275.00 is guaranteed in writing regardless of when death occurs, whereas the nonmember price is subject to change over time.

109. FLA. STAT. § 872.03 (1975).

110. National offers several optional methods for disposing of cremains. The ashes can be scattered over a special cemetery garden or at sea, sealed in an urn and returned to the family, or buried in a cemetery. A final option is described in one of National's advertising brochures:

> For those seeking to pay a final tribute to a loved one, the National Cremation Society provides that opportunity.
>
> The urn used by National Cremation Society is a hollow sphere, made of biodegradeable [*sic*] material, which, when submerged in water, dissolves in a short time. The material is non-pollutant and will not harm any water life or, indirectly, human life.

National Cremation Society was scarcely one week old when its existence was threatened by several bills introduced in the 1973 Florida Legislature. House Bill 514 was designed to bring "persons offering to reduce the body of a deceased person to cremated remains (human ashes)" within the regulatory powers of the State Board of Funeral Directors and Embalmers.[111] House Bill 516 was designed similarly to include "persons offering to dispose of the dead without the services of a funeral director and/or embalmer" among those whom the State Board regulated.[112] Those operating crematories would be required to obtain a "certificate of approval" from the State Board[113] and those disposing of the dead "without the services of a funeral director and/or embalmer" would be required to obtain a permit to operate from the Board.[114] Both bills provided for the promulgation of rules and regulations governing the respective businesses and gave the Board authority to inspect both cremation and disposal facilities.[115]

Similar legislation was introduced in the Florida Senate. Senate Bill 397 tracked the language of House Bill 516, requiring those disposing of the dead without the services of a funeral director or embalmer to obtain permits from the State Board.[116] Senate Bill 398 was the counterpart of House Bill 514; it provided for Board regulation of those operating crematories.[117]

National strenuously opposed the legislation, arguing that the bills would eliminate direct cremation services in Florida because they feared prohibitive rules and regulations of the State Board would force them out of business.[118] The Board and the Florida Funeral

---

> The cremated remains are placed in this urn and is [*sic*] permanently sealed at the crematory. It is then transported, according to your instructions, to an oceanic site for placement on the water.
>
> Once this urn touches the water surface, it begins to sink to the ocean bed where it rests until completely dissolved. The ashes fall to the floor, returning the human element back to whence it came millions of years ago.

(Advertisement in possession of author.)

111. Fla. H.R. 514, § 1 (1973).

112. Fla. H.R. 516, § 1 (1973). House Bills 514 and 516 were introduced on April 3, 1973, along with House Bill 515, which provided that the State Board promulgate regulations for reciprocity arrangements with foreign funeral director and embalmer licensing boards. FLA. H.R. JOUR. 48 (1973). (House Bill 515 was eventually passed by both the House and Senate, and was signed into law by the Governor on May 30, 1973. Act of May 30, 1973, ch. 73-88, § 1, 1973 Fla. Laws 141.)

113. Fla. H.R. 514, § 4.

114. Fla. H.R. 516, § 4.

115. Fla. H.R. 514, §§ 3, 4; Fla. H.R. 516, §§ 3, 4.

116. Fla. S. 397 (1973).

117. Fla. S. 398 (1973).

118. Telephone conversation with Charles E. Jordan, General Manager and Director, National Cremation Society (Aug. 20, 1975).

Directors Association took the position that all activities involving the disposition of the dead should be regulated in the public interest and that the Board was best equipped for such regulation, whether the method of disposition be a funeral or direct cremation.[119] They stressed that the bill would not require a direct cremation business to obtain a funeral director's license, but merely a permit to dispose of the dead, and that rules and regulations separate from those for funeral directors would be adopted by the Board for the regulation of permittees.[120]

While the bill backed by the Florida Funeral Directors Association was debated in the legislature,[121] the State Board had been working with the Florida Attorney General's office on possible legal action against the direct cremation organization. In April, 1974, the Board sought an injunction from the Circuit Court of Pinellas County (in which St. Petersburg is located) against the Telophase Society of Florida, National Cremation Society,[122] and the directors of the two corporations, claiming that National was practicing the profession of funeral directing without a license in violation of chapter 470, Florida Statutes, the funeral directors and embalmers law. Specifically, the Board alleged that National was engaged in funeral directing as defined in section 470.01(3), Florida Statutes, which states:

> The term "funeral directing," as used in this chapter, shall be construed to mean the profession of directing or supervising funerals for profit, *or* the profession of preparing dead human bodies for burial or cremation by means other than embalming, *or* the disposition or shipping of dead human bodies, *or* the provision or maintenance of a place for the preparation of dead human bodies.[123]

---

119. Telephone interview with F. James Wylie, President, Florida Funeral Directors Ass'n (Aug. 22, 1975). There was logic in this argument with respect to cremation activities, because Florida's funeral director and embalmer licensing law provides that cremation facilities "shall be subject to the inspection and regulation provisions of this chapter." FLA. STAT. § 470.10(9) (1975).

120. Telephone interview with F. James Wylie, Jr., President, Florida Funeral Directors Ass'n (Aug. 22, 1975). *See also* Fla. H.R. 516, § 3 (1973).

121. The legislation proposed in both the House and the Senate eventually died in committee. Florida Legislature, History of Legislation, 1973 Regular Session, Senate Bill Actions Report at 115; House Bill Actions Report at 118–19.

122. In March, 1973, two corporations had been formed: Telophase Society of Florida, Inc. and Terminus Society. In October, 1973, Terminus Society was renamed National Cremation Society, Inc., and the latter corporation assumed all of the option agreements for cremation that the Telophase Society of Florida, Inc. had entered into. The directors of National were the same as those of Telophase, and National had assumed the same physical plant previously used by Telophase. *See* Brief of Appellant at 6, Telophase Soc'y v. State Bd. of Funeral Directors & Embalmers, 334 So. 2d 563 (Fla. 1976).

123. (Emphasis added). This was the language referred to by the President of the State Board in his speech which the founders of the National Cremation Society had

The Board filed a motion for summary judgment.[124] After reviewing the pleadings, depositions, and affidavits, and after hearing oral argument, the circuit court ruled that Telophase was indeed practicing the profession of funeral directing in violation of the statute and entered a partial summary judgment specifically enjoining the firm from (a) maintaining a place for the preparation of dead human bodies, (b) preparing dead bodies for cremation, and (c) disposing of dead human bodies by cremation.[125]

National petitioned the trial court for a writ of supersedeas. The trial court granted the writ, which stayed the order and allowed National to continue in business pending final resolution of the case.[126] National filed a notice of interlocutory appeal in the Second District Court of Appeal for Florida.[127]

National raised several issues pertaining to section 470.01(3), Florida Statutes. First, National argued that the circuit court had erred in holding that the section should be read in the disjunctive and that the performance of any of the enumerated activities constitutes the practice of funeral directing. National contended that the word "or" after each clause was intended by the legislature to have a conjunctive meaning, and should be read as "and," thus requiring the performance of all enumerated activities to constitute the practice of funeral directing.[128] The district court of appeal disagreed and affirmed the circuit court, saying it was obviously the legislature's intent to regulate each activity mentioned, that the statute was "written with each category separated by the word 'or' " and that the court would "assume the statutory language was chosen with regard to its grammatical propriety."[129]

National also maintained on appeal that (a) it did not "prepare" dead human bodies for cremation, but merely "held" them in a refrigerated facility for the forty-eight hours required by law before cremation could occur; and (b) that it did not provide or maintain a place for the preparation of dead human bodies, because the place referred to in the statute was a preparation room used for embalming and

---

seen as a "loophole" in the Florida licensing law. *See also* note 53 *supra* for a comparison with the California statutory language.

124. State Bd. of Funeral Directors & Embalmers v. Telophase Soc'y, Inc., No. 73-5957, slip op. at 1 (Fla. Cir. Ct. Pinellas County, May 1, 1974).

125. *Id.* at 2-3.

126. *Id.*

127. Telophase Soc'y, Inc. v. State Bd. of Funeral Directors & Embalmers, 308 So. 2d 606 (Fla. 2d Dist. Ct. App. 1975), *aff'd* 334 So. 2d 563 (Fla. 1976).

128. Appellant's Main Brief at 20-26, Telophase Soc'y, Inc. v. State Bd. of Funeral Directors & Embalmers, 308 So. 2d 606 (Fla. 2d Dist. Ct. App. 1975).

129. 308 So. 2d at 608.

cosmetizing which National said it did not have in its building. The district court of appeal declined to rule on either of these issues, saying that a finding by the lower court that National's activities were within the scope of any one of the activities enumerated in section 470.01(3) justified issuance of the injunction.[130]

The district court of appeal also was asked to rule on three state and federal constitutional issues raised by National.[131] First, National claimed that application of the funeral directing law to its activities and not to those of others involved with holding dead human bodies, such as hospital orderlies, morgue personnel, and medical school students, was an unequal application of the law in violation of article I, section 1 of the Florida Constitution, and the fourteenth amendment to the United States Constitution.[132] The court responded, as the State Board had argued in its brief, that the others are subject to separate regulatory laws.[133] Moreover, the court held that even if those persons were not otherwise regulated, selective enforcement of the Florida statute against National would not constitute an unconstitutional application of the law.[134]

National raised a second constitutional issue, which was that the circuit court's injunction was an unreasonable denial of National's right to engage in a lawful occupation, there being no overriding public purpose to be served by the injunction.[135] The district court, however, again supported the State Board's argument and held that National's activities were very much amenable to regulation because of an overriding interest affecting the public health, safety, and welfare.[136] The court further held that the regulatory measures prescribed in chapter 470, Florida Statutes, were within a proper exercise of the state's police power.[137]

Finally, National argued that the application of the funeral directing law to its activities was an impairment of the obligation of contracts protected by the Florida and United States Constitutions.[138] To

---

130. *Id.*

131. National claimed that because the trial court had not expressly ruled on the constitutional issues the partial summary judgment had been premature. The district court of appeal held that under the doctrine of inherency, the trial court had necessarily rejected National's constitutional arguments by entering the injunction, and therefore the issues could be raised on appeal. 308 So. 2d at 608–09.

132. *Id.*

133. *Id.* at 609.

134. *Id.*

135. *Id.* at 608–09.

136. *Id.* at 609.

137. *Id.*

138. *Id.*

this the district court replied that "all contracts are entered into subject to the valid exercise of the police power of the state."[139]

After the district court affirmed the injunction against the National Cremation Society, National immediately petitioned for a rehearing of the court's decision, but the petition was denied.[140] In April, 1975, National filed a notice of appeal and a notice of interlocutory appeal in the Florida Supreme Court and petitioned the court for a writ of certiorari to consider the district court decision. The supreme court denied certiorari,[141] but decided to hear the appeals.[142]

National raised five issues in the Florida Supreme Court. First, National contended that Florida's funeral director and embalmer law was an unlawful exercise of the police power which constituted a violation of substantive due process guaranteed by the Fourteenth Amendment.[143]

National argued that there was no rational basis for requiring, as the district court of appeal had, that crematories operate with licensed embalmers. "Why," National queried, "should licensed embalmers be the only persons who can cremate when embalming is not even required for cremation?"[144] Since all funeral directors must be licensed embalmers,[145] and since embalming is not necessary for cremation, it follows that there is no reasonable basis on which to require that crematories operate with a licensed funeral director.[146] Further, National pointed out that it did not hold any funeral or memorial services and therefore did not require the services of a funeral director.[147] The court responded, in a 5–2 opinion, that appellants had suffered no denial of substantive due process, stating that the public health and welfare required regulation of funeral directing and embalming. "It is clear to us," the court said, "that [National] practices funeral directing as defined by section 470.01(3)."[148] The court further found that the legislature had intended that those operating crematories were within the purview of the licensing statute.[149]

---

139. *Id.*
140. *Id.* at 606.
141. Telophase Soc'y, Inc. v. State Bd. of Funeral Directors & Embalmers, 327 So. 2d 229 (Fla. 1976) (mem.).
142. Telophase Soc'y, Inc. v. State Bd. of Funeral Directors & Embalmers, 334 So. 2d 563, 566 (Fla. 1976).
143. *Id.*
144. Brief of Appellants at 15.
145. FLA. STAT. § 470.08(2)(a) (1975).
146. Brief of Appellants at 15.
147. *Id.*
148. 334 So. 2d at 566. For statutory language, see text accompanying note 123 *supra.*
149. *Id.*

National next contended that the appellate court had erred in construing section 470.01(3), Florida Statutes, in the disjunctive, arguing that analysis of the entire statutory section showed the legislature had intended the word "or" to have a conjunctive meaning.[150] National pointed out that subsection (3) of section 470.01, Florida Statutes, stated in part the "shipping of human bodies."[151] If the statute were to be construed in the disjunctive, National argued, then hospital orderlies, ambulance services, and common carriers practiced funeral directing each time they "shipped" a body.[152]

The statutory definition of "funeral directing" included the phrase, "the provision or maintenance of a place for the preparation of dead human bodies."[153] If read in the disjunctive, this phrase would require the coroner's office, the hospital morgue, and schools of medicine to be licensed as funeral directors.[154] If such absurd conclusions would be reached by reading the statute in the disjunctive, National contended, the courts should interpret "or" to mean "and."[155]

Third, National argued, as it had in the appellate court, that it did not "prepare" dead human bodies for burial by means other than embalming but merely "held" human bodies which were to be cremated.[156] National further argued that because testimony that National "held" bodies prior to cremation created a material issue of fact, summary judgment was error.[157] The supreme court affirmed the appellate court's holding, stating that "[t]he receiving, refrigerating, storing and cremating [of] dead bodies" was preparation of dead bodies and was a violation of Chapter 470, Florida Statutes.[158]

Fourth, National contended that the appellate court had erred in concluding that National disposed of dead human bodies, and had thus erred in affirming the partial summary judgment in the face of a genuine issue of material fact.[159] National urged that the term "disposition" as used in the statute was colored by the addition of the phrase "or shipping" and should be limited to a transportative sense.[160] When read that way, National contended, there was a genuine issue of

150. Brief of Appellants at 23–24.

151. *Id.* at 24.

152. *Id.* at 24–25.

153. FLA. STAT. § 470.01(3) (1975).

154. Brief of Appellants at 26.

155. *Id.*

156. Brief of Appellants at 28–31. National urged that "preparation" meant some change or alteration—something active in nature—while "holding" meant no change in the natural condition of the body—a passive act. *Id.* at 30.

157. *Id.* at 31.

158. 334 So. 2d at 567.

159. Brief of Appellants at 34–37.

160. *Id.* at 35–36.

material fact as to whether National disposed of dead human bodies, and summary judgment could not be granted.[161] The supreme court disagreed with National, and, in one sentence, affirmed the appellate court's finding that National disposed of dead human bodies.[162]

National's final point was that it did not, as set forth in the licensing law, "[provide or maintain] a place for the preparation of dead human bodies."[163] National argued that by statutory definition, a preparation room required embalming equipment[164] and was therefore unrelated and unnecessary to its business.[165] National also argued that because it did not prepare dead human bodies, it did not provide a preparation room.[166]

The supreme court, relying on its finding that the receiving, refrigeration, and cremation of dead bodies constituted "preparation," affirmed the appellate court's finding that National maintained a place for the preparation of dead human bodies. Thus National was within the purview of the funeral director and embalmer law.[167]

Justice England, in a dissent with which Chief Justice Overton concurred, disagreed that National was subject to Florida's regulatory scheme for funeral directors and embalmers.[168] The dissent found that National did not embalm and had no need to do so.[169] Justice England remarked that National met Board of Health standards, yet provided a less expensive method alternative to the "typical . . . funeral which has become part of our culture."[170] The dissent chastised the majority: "By requiring petitioners to be licensed, and therefore to hire or be 'embalmers,' the majority has placed its approval on a purely anti-competitive statute by accepting a superficial appeal to the police power."[171] The dissent accepted National's argument that the statute could be read logically only in a cumulative sense, rather than in the disjunctive.[172] "[W]hen read in that fashion," the dissent stated, "the state's legitimate interests become immediately apparent."[173]

Finding no apparent reason to involve the police power to require licensure of National under the Florida statute, the dissent concluded:

161. *Id.* at 37.
162. 334 So. 2d at 567.
163. Brief of Appellants at 38–44.
164. *See* FLA. STAT. § 470.01(6)(b) (1975).
165. Brief for Appellants at 38–39.
166. *Id.* at 39–40.
167. 334 So. 2d at 567.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. 334 So. 2d at 567 n.1.
173. *Id.* at 568.

"Arbitrary licensing requirements which preserve a trade or professional monopoly for no discernible public purpose should not be sanctioned by the courts."[174] After its defeat in the Florida Supreme Court, National petitioned in federal district court to stay the Florida Supreme Court's order, pending resolution in the United States Supreme Court of the constitutionality of the statute as applied to National. The federal court denied the stay.[175]

In 1975, at the same time National filed its appeal in the Florida Supreme Court, a bill was introduced in the Florida House of Representatives which provided that those engaging in the disposition of human bodies by cremation without the services of either a funeral director or an embalmer be issued permits by the Board of Business Regulation (as opposed to licensure by the State Board of Funeral Directors and Embalmers).[176] The bill set forth requirements for permit applicants, specifications of the facility in which cremation would take place, and required applicants to post bond prior to obtaining a permit.[177] The bill also authorized the Department of Business Regulation to conduct necessary inspections of a permit holder's practice and facilities.[178] The regulation of the practice of cremation set forth in House Bill 1315 was essentially the same as that in the 1973 legislation which had been backed by the funeral profession, except that the 1975 bill proposed that the Department of Business Regulation be the regulatory authority. Thus House Bill 1315 proposed regulation which would protect the public health, safety, and welfare, but which would not subject those who practiced only cremation to the authority of those in the funeral directing and embalming business.

National supported the bill, conceding the necessity for state regulation of its business. National agreed that it should be regulated, as

---

174. *Id.* (citations omitted).

175. Telophase Nat'l Cremation Soc'y, Inc. v. Askew, No. 76–133 (N.D. Fla., Sept. 1, 1976). The case was dismissed in February, 1977. *Id.* (Feb. 16, 1977).

176. Fla. H.R. 1315, § 3 (1975). H.R. 1315 was read for the first time on the floor of the Florida House of Representatives on April 16, 1975. The bill was referred to the Committees on Regulated Industries and Licensing, Finance and Taxation, and Appropriations. FLA. H.R. JOUR. 186 (1975).

The State Board of Funeral Directors and Embalmers is a unit within the Division of Professions of the Florida Department of Professional and Occupational Regulation. FLA. STAT. §§ 20.30(9)(g), 470.02(1) (1975). The Florida Department of Business Regulation is a separate entity, governed by the Board of Business Regulation. *Id.* § 20.16(1). The Department of Business Regulation includes the following divisions: Pari-mutual Wagering; Hotels and Restaurants; Florida Land Sales and Condominiums; Beverage; and General Regulation. *Id.* § 20.16(2).

177. Fla. H.R. 1315, § 4 (1975).

178. *Id.* § 3.

was any other business in the state, by the Department of Business Regulation.[179] The Florida Funeral Directors Association opposed the bill, contending that the Department of Business Regulation was not the proper agency to oversee the practice of cremation. Because the Department of Business Regulation regulated industries such as hotels and restaurants, land sales, horse racing, and beverage sales, the Association maintained the Department lacked the expertise and resources to regulate direct cremation services.[180] The Association feared that the activities of commission-basis salesmen, such as those employed by National, would not be subject to adequate control under the proposed legislation.[181]

On May 23, 1975, just two weeks before the end of the legislative session, the sponsors of the bill and the Committee on Regulated Industries and Licensing recommended a committee substitute for House Bill 1315.[182] The substitute bill substantially changed three portions of the original bill. First, it provided that the State Board of Funeral Directors and Embalmers regulate the business of disposition of dead human bodies by cremation.[183] Second, in addition to requiring a surety bond from a permit holder, as had the original bill, the committee substitute required each permittee to hold all membership fees and other payments for future services in a trust fund until the services secured by the payments were performed.[184] Finally, the committee substitute required that each establishment practicing disposition by cremation operate under the "full charge, control and supervision of an individually designated licensed funeral director."[185]

The Committee Substitute for House Bill 1315 was referred to the Committee on Finance and Taxation, then withdrawn from that committee and referred to the Appropriations Committee,[186] where it remained at the close of the 1975 session. The bill was pre-filed for

---

179. Telephone interview with Charles E. Jordan, General Manager and Director, National Cremation Soc'y (Aug. 20, 1975).

180. Telephone interview with F. James Wylie, Jr., President, Florida Funeral Directors Ass'n (Aug. 22, 1975).

181. Telephone interview with James C. Cooper, Executive Secretary, Florida Funeral Directors Ass'n (Aug. 3, 1975).

182. FLA. H.R. JOUR. 683 (1975).

183. Committee Substitute for House Bill 1315, § 3 (1975).

184. *Id.* § 2(7).

185. *Id.* § 2(4). According to F. James Wylie, President of the Florida Funeral Directors Association, who was intimately involved in the legislative events discussed here, neither the State Board nor the Association knew of the funeral director requirement in advance. Telephone interview (Aug. 22, 1975).

186. Florida Legislature, History of Legislation, 1975 Regular Session, House Bill Actions Report at 294.

the 1976 legislative session, but it died in the Committee on Appropriations during that session.[187]

In 1976, the Florida Legislature reconsidered Florida's scheme of professional and occupational regulation. The Legislature passed the Regulatory Reform Act of 1976[188] which prospectively abolished many professional licensing agencies and set forth criteria by which the legislature should determine whether to reestablish those agencies. The Legislature stated its intent that no profession or occupation be subject to state regulation unless regulation was necessary to protect the public health, safety, or welfare from "significant and discernible harm or damage."[189] The Legislature further mandated that no business be regulated in a manner "which will unreasonably adversely affect the competitive market."[190]

The Regulatory Reform Act provided for cyclical repeal of the various statutory chapters creating occupational licensing boards and commissions. Some thirty-six agencies, including the Board of Funeral Directors and Embalmers, are scheduled for termination on July 1, 1978,[191] but the Regulatory Reform Act created a joint select committee to review the activities of those agencies and to make proposals for their reestablishment and reform.[192]

In determining whether to reestablish a licensing program, the Legislature is to consider the following criteria:

> (a) Would the absence of regulation significantly harm or endanger the public health, safety, or welfare?
>
> (b) Is there a reasonable relationship between the exercise of the state's police power and the protection of the public health, safety, or welfare?
>
> (c) Is there another, less restrictive method of regulation available which could adequately protect the public?
>
> (d) Does the regulation have the effect of directly or indirectly increasing the costs of any goods or services involved, and, if so, to what degree?

---

187. Florida Legislature, History of Legislation, 1976 Regular Session, House Bill Actions Report at 196–97.

188. Ch. 76–168, 1976 Fla. Laws 279 (codified in part at FLA. STAT. § 11.61 (1976 Supp.)).

189. FLA. STAT. § 11.61(2)(a) (1976 Supp.).

190. *Id.* § 11.61(2)(b).

191. Regulatory Reform Act of 1976, ch. 76–168, § 3, 1976 Fla. Laws 280.

192. FLA. STAT. § 11.61(8) (1976 Supp.). Legislative recommendations as to continuation, modification, or repeal of existing licensing programs are to be made by February 15 in the year of repeal. *Id.* § 11.61(3). Thus, legislative recommendations regarding licensure of funeral directing and embalming are to be made no later than February 15, 1978.

(e) Is the increase in cost more harmful to the public than the harm which could result from the absence of regulation?

(f) Are all facts of the regulatory process designed solely for the purpose of, and have as their primary effect, the protection of the public?[193]

The Florida Legislature, then, has the opportunity to rewrite its funeral director licensing laws. Hopefully, the Legislature will look carefully at the problems of the direct cremation business—especially in light of the Florida Supreme Court's decision—and will come forward with a regulatory scheme for direct cremation services that is fair as well as reasonably related to the enterprise sought to be regulated.

V. Proposed Solutions

To some, the California and Florida experiences with Telophase and National portend further challenges to existing and appropriate state regulatory systems for funeral directors and embalmers. To others, they represent a welcome first step in the successful penetration of an established occupation's exclusive control over the market for a necessary societal service. Whether it be characterized as a threat to a sound regulatory system or as an opportunity for overdue change, serious attack has been made on the status quo for occupational licensing laws for funeral directors and embalmers. All indications are that the challenge has just begun.[194]

That challenge, as its California and Florida manifestations illustrate, is rich in controversy and as such may be destined for similarly hard-fought resolution in the courts and legislatures of the various states. But the time, expense, and ill-will caused by battles of the type witnessed in California and Florida are not necessarily born of the challenge. Solutions can be fashioned through the joint effort of public officials and representatives of the adverse interests involved.

A successful effort requires two initial elements: first, that those who participate be realistic in their expectations and constructive in their approach; and second, that they share a common perception of the problem and its potential for resolution. The first, of course, de-

193. *Id.* § 11.61(4).

194. Since the founding of the Telophase Society of California, 16 direct cremation services have begun operation in that state, usually in larger population areas where proportionately more cremations are performed than in smaller cities and rural areas. Telophase franchise agreements are available in California, with the plan being to offer them nationwide at a later date. In Florida, the National Cremation Society has offices in three cities, and its owners are investigating possible markets in at least ten other states. Telephone interview with Charles E. Jordan, General Manager and Director, National Cremation Society (Aug. 20, 1975).

pends on the character of the participants; a basis for the second can be provided here.

A. The Courts as a Forum for Resolution

Faced with the ongoing violation of a statute it is charged to administer, a state regulatory board naturally turns to the courts for recourse after its own efforts to obtain compliance have failed. Likewise, those opposing the attempted application of a regulatory statute to their activities often see the judiciary as the proper forum for redress. The decision of either side to seek a judicial remedy involves consideration of three major factors.

The first is the problem of determining legislative intent. As indicated earlier, loosely worded and vague definitions of the terms "funeral director," "funeral directing," "funeral establishment," and "preparation room" make them susceptible to challenge by direct cremation services. Illustrative is the challenge brought in California, where the court agreed with the Telophase Society's argument that the definition of "funeral director" in the former California licensing law could reasonably be construed as not encompassing the activities of a direct cremation service.[195] However, while this finding was sufficient for determining the narrow question of the statute's scope, it contributed little to effecting a solution to the larger problem. Indeed, the California court indicated its belief that the legislature had *intended* to provide for the regulation of all those involved in disposing of dead human bodies, but had failed to do so in its choice of statutory language.

The Florida Supreme Court has accepted the argument that the legislature, in enacting the statute, intended all activities associated with the disposition of the dead to be performed by licensed funeral directors or embalmers only. This argument may be accepted in other states, but it seems tenuous to maintain that legislatures passed existing funeral director licensing laws with the intent of excluding direct cremation services. Such operations neither existed nor were contemplated when the statutes were enacted. The legislative histories behind funeral director licensing laws reveal that they were encouraged by funeral director trade associations and adopted by legislatures to ensure minimum health and sanitation standards in the art of embalming and in the transportation of dead bodies, and to eliminate the competition of funeral "merchandisers" who manufactured and sold

---

195. Department of Consumer Affairs v. Telophase Soc'y, No. 336679 (San Diego Super. Ct. Dec. 4, 1972).

caskets and other funeral goods, but who did not furnish the personal services of a funeral director.[196]

If any legislative intent is to be gleaned from these statutes, it is that as protector of the public health, the state should regulate who is permitted to embalm bodies and offer other services connected with the conduct of a funeral.[197] The holding in *Department of Consumer Affairs v. Telophase Society*, represents at least one precedent in support of this interpretation, where a court found that the California funeral director licensing law (as it was written in 1972) was addressing the activities associated with the preparation and arrangement of a funeral, and not the activities of a direct cremation service.

If the terms in a state's funeral director licensing law were defined unambiguously and a clear expression of legislative intent were to leave no doubt that only licensed funeral directors would be permitted to engage in the disposition of the dead human bodies, a second factor would remain. An established principle underlying the regulation of occupations is that such regulation is an exercise of the state's police power and therefore may not be carried out in an unreasonable or arbitrary manner.[198] One standard for evaluating the reasonableness of an occupational licensing law for funeral directors would be to examine the statutory requirements for licensure in light of the functions to be performed by the licensee.

Adopting this functional approach, it becomes evident that many of the requirements for licensure as a funeral director are unnecessary to the operation of a business limited to direct cremation services. Standards of proficiency and suitability for funeral director licensees that relate to the offering of funeral services are entirely defensible. Doubts arise, however, when licensing requirements do not relate to the function to be performed. For example, a person would not require the extent and content of education prescribed for funeral directors to properly perform the functions of one engaged in the direct cremation business. Courses in embalming, funeral business management, and the techniques of funeral directing would be totally irrelevant to the performance of that person's occupational tasks. Neither the apprenticeship nor internship requirements of funeral director licensing laws are functional for a person in the direct cremation business, nor are the requirements for certain physical facilities that are obviously addressed to the maintenance of a funeral home

196. HABENSTEIN & LAMERS, *supra* note 42, at 494–500.

197. *Id.*

198. *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1954); Nebbia v. New York, 291 U.S. 502 (1934).

equipped for embalming, visitation, and funeral services, and for the sale of caskets and other funeral supplies.

A similar functional analysis has been applied by courts in several states when asked to decide a related issue: whether a state can require applicants for a funeral director's license to have an embalmer's license. The weight of authority is that considerations of the public health and welfare do not justify such statutes; the requirements are invalid.[199] The functional analyses used by the courts in these cases provide interesting parallels for the licensing problem here discussed. In *Gholson v. Engle*,[200] for example, the Illinois Supreme Court held that a funeral director need not be required to have the knowledge, skill, and training of an embalmer before he can direct a funeral. In the court's words:

> The funeral director is concerned primarily with the amenities of the funeral service. Proper performance of his other functions, such as removing and dressing the body, ascertaining the cause of death, and inspecting the body while it is in the coffin, does not require a year of college, nine months at an embalming school and a year's service as an apprentice embalmer. Nor are these qualifications necessary in order that he may effectively supervise the work of the embalmer. Specialized training is not required in order to recognize the conditions that require further work on the part of the embalmer.[201]

A functional argument has equal force when applied to the question of whether a person in the direct cremation business should be required to obtain a funeral director's license. Using the *Gholson* analysis as an analog, a court could find the requirement to be an unreasonable, and thus an unconstitutional, restriction of a person's right to pursue the occupation of his choice.

This prospect, however, must be tempered by a third factor to be considered in determining whether to seek a judicial remedy—a factor which derives from observation of judicial behavior. Despite the pronouncements found in the *Gholson* case, the judicial inclination is to uphold most licensing statutes as a permissible exercise of legislative power. To the extent that state courts follow the lead of the United

199. Cleere v. Bullock, 361 P.2d 616 (Colo. 1961); Gholson, v. Engle, 138 N.E.2d 508 (Ill. 1956); Kemplinger v. Whyte, 188 N.W. 607 (Wis. 1922); State v. Rice, 80 A. 1026 (Md. 1911); People v. Ringe, 90 N.E. 451 (N.Y. 1910); Wyeth v. Thomas, 86 N.E. 925 (Mass. 1909). *Contra*, McKinley v. Reilly, 393 P.2d 268 (Ariz. 1964), *appeal dismissed*, 381 U.S. 276 (1965); State Bd. of Funeral Directors & Embalmers v. Cooksey, 3 So. 2d 502 (Fla.), *modified on other grounds and rehearing denied*, 3 So. 2d 502, 508, *adhered to on rehearing*, 4 So. 2d 253 (Fla. 1941).

200. 138 N.E.2d 508 (Ill. 1956).

201. *Id.* at 512.

States Supreme Court,[202] they will be reluctant to substitute their preferences for those of the people's elected representatives, presuming instead that a legislature, in adopting the statute, did in fact have knowledge of conditions supporting its judgment that the legislation was in the public interest. That presumption is not easily overcome in an occupational licensing case, and the courts usually hold that the appropriate forum for the correction of ill-considered legislation is the legislature itself.[203]

The examination of these three factors suggests that if a judicial remedy is sought, the results can be grouped into two possible categories. One is that a court may find a state's licensing law invalid either because it is ambiguous as to scope and intent, and therefore does not apply to the activities of a direct cremation service, or because it is unreasonably restrictive and therefore void. While such a result obviously would be welcomed by a direct cremation service challenging the statute, it merely indicates the limitations of the statute in question. It leaves unanswered the critical question of how the inadequate statute should be corrected.

The second possibility is that a court would uphold the statute as a proper exercise of legislative power to regulate the disposition of dead bodies. When that is the result, there remains the equally salient question of whether a funeral director's license is the proper means for such regulation. Thus the courts ultimately provide an unsatisfactory forum for the effective resolution of the question of whether all those engaged in the disposition of dead human bodies should be licensed as funeral directors.

B. The Legislature as a Potential Forum for Resolution

In our system of government, the legislative branch is the designated voice for determining in the first instance how the police power should be used to protect the public interest. Because of competing private interests involved in the statutory resolution of most public policy problems, this determination is often the result of a decisionmaking process involving negotiation and compromise. Barring acquiescence on the part of state funeral boards, or voluntary compliance with funeral director licensing requirements on the part of direct cremation businesses (both unlikely events), it is evident that any meaningful

202. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297 (1976); Williamson v. Lee Optical, 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

203. *See, e.g.*, Golden v. McCarty, 337 So. 2d 388, 390 (Fla. 1976) ("What is harmful or injurious to the public is for the Legislature to decide and courts should not substitute their judgment therefor."). *But see* World Fair Freaks and Attractions, Inc. v. Hodges, 267 So. 2d 817 (Fla. 1972).

resolution of the problem under discussion will embody both elements of the legislative decisionmaking process. Thus the legislature, rather than the judicial system, is the more appropriate forum for effecting change in state regulation of funeral professionals and those involved in direct cremation services.

At first blush, this might appear to be an advantage for the organized funeral industry with its established lobbies and entrenched control over the regulatory process through positions on state licensing boards. Under this view, the only task for the funeral profession would be to see that the status quo in funeral directing licensure is maintained, a seemingly easy assignment since legislators are not automatically inclined to undo what at one time they said must be done to protect the public interest. But if the experiences in California and Florida are any indication, some legislators are willing to listen to voices of change and consider altering the status quo to permit the existence of direct cremation businesses without requiring them to obtain a funeral director's license. Though efforts to this end have not yet succeeded in either state, the near misses are instructive to anyone looking ahead in anticipation of repeat attempts.

Assuming legislative reception to some form of change in the status quo for licensing those occupations involved in disposing of the dead, the contents of legislative proposals to bring about that change are of ultimate importance. To avoid charges of causing an abusive use of a state's police power, those responsible for structuring the proposals must reorient themselves to the fundamental principle behind occupational licensing systems.[204] The foremost consideration must not be the welfare of a given occupational interest, but rather the protection of consumers. Prophylaxis, not aggrandizement, should be the guideword in the design of such proposals. In this spirit, the following outline of a solution is offered.

C. *A Proposed Solution*

The first consideration in the design of an occupational licensing system to provide for the regulation of those involved in disposing of the dead is whether there is a genuine need for invoking a state's police power in the interest of protecting the public health, safety, and welfare. As stated earlier, virtually all state legislatures have declared a need, in the public interest, for regulating the activities of funeral directors and embalmers, and these declarations have been upheld by the courts whenever challenged.[205] Several sound policy argu-

204. *See* text accompanying notes 47–52 *supra*.

205. *See* note 32 *supra*.

ments support similar affirmative legislative responses with respect to direct cremation services.

The primary policy basis for regulating the activities of a direct cremation business concerns the public health. In any phase of a direct cremation service's handling of a dead human body, whether it be transportation, boxing, storage, or cremation, there is a legitimate governmental interest in insuring that it be done by competent individuals, in a sanitary manner, and with sanitary facilities to guard against the spread of normal bacteria produced in a dead body. The interest is heightened in importance when death results from communicable disease. A second argument in favor of regulation for direct cremation businesses is to ensure against misuse of the membership fees which most such businesses charge in advance of performing post-death services. Most states have provided for strict regulation of similar pre-need funeral arrangements,[206] and there is no logical basis for not affording the same protection to consumers of an alternative means of disposition. Third, the state has an interest in securing the highest likelihood that those who are involved in a direct cremation business will conduct themselves in accordance with the laws and administrative regulations designed to promote the competent practice of such activity. Compliance with the law is certainly fostered by knowledge of it, which, for operators of a direct cremation business, can be determined by means of a simple examination, the successful completion of which is a condition for state authorization to enter into the business. A fourth consideration has to do with the state's jurisdiction over those engaged in the direct cremation business to enable an appropriate agency of government to investigate consumer complaints and to revoke the license of individuals whose abuses of the public interest are verified.

Having established that there is a legitimate state interest in regulating occupations involved with the disposition of the dead, the remaining question in designing a solution goes to the form and substance that that regulation should take. The proposal offered here presumes acceptance of the functional approach to occupational licensing mentioned above, and rests on three major recommendations for change.

(1) The Recognition of a New Occupation.—State legislators, as well as the American funeral profession must recognize the emergence of a legitimate peripheral occupation offering to perform part of what traditionally has been the exclusive responsibility of a funeral direc-

206. *See, e.g.*, CAL. BUS. & PROF. CODE § 7735 (West Supp. 1977); NEB. REV. STAT. § 71-1342 (1976); WIS. STAT. ANN. § 156.125 (West 1974).

tor. By definition, as well as for considerations of sense and fairness, the operation of a direct cremation service should be considered separate and distinct from the practice of a funeral professional.

If professional appellations are to have any meaning, there should be a discernible relationship between title and function. Funeral directors, while they may perform related functions, are primarily concerned with the arrangements for, and conducting of, funeral services. If others offer to provide direct cremation services without funeral or religious services, it is sensible to recognize that distinction by the formal title used to refer to them. And if functional differences between two related occupations will support separate titles, those differences ought to support separate classifications and requirements for licensing. Thus, California's practice of referring to and licensing direct cremation services as funeral directors is a misuse of words. In California, as elsewhere, direct cremation businesses should be recognized as constituting a new occupational activity related to, yet separate from, the funeral profession.

(2) The Restructuring of Existing Regulatory Boards.—Having recognized three separate occupations involved with the disposition of the dead—funeral directing, embalming, and direct cremation (or two in those states which combine the occupations of funeral director and embalmer into one)—and having established a public need for state regulation of their activities, we turn to consider how that regulation should be structured. In doing so, we must recognize the economy and logic of drawing on the resources and capabilities of existing regulatory boards for funeral directors and embalmers in each state. With minor alterations, these boards can be restructured in form and function to discharge the public interest in the effective regulation of post-death disposition services.

An existing state funeral board constitutes a regulatory apparatus functionally equipped to administer state health and business regulations, implement policies on minimum qualifications for practice, administer competency examinations, issue licenses, and investigate consumer complaints, whether it be for funeral directors, embalmers, or direct cremation businesses. Given this available expertise and considerable investment in state resources, creating a separate regulatory agency for direct cremation services or placing them under an agency not qualified to perform the desired regulatory functions would be neither functional nor economical. The former especially would contravene one of the primary objectives of occupational licensing reform, which is to stem the proliferation of separate licensing agencies.[207]

207. *See, e.g.*, Regulatory Reform Act of 1976, ch. 76-168, 1976 Fla. Laws 279

The critical issue concerning the use of an existing funeral board structure, however, is not over its functional capabilities, but rather its membership. Here again, considerations of sense and fairness militate against a board comprised of funeral professionals or of those protective of funeral service interests with authority to oversee the operations of a direct cremation business. To prevent such inequity, membership on licensing boards should include at least proportionate representation from those engaged in the direct cremation business. In states where board membership is appointive, qualified individuals could be selected from among direct cremation practitioners. Where membership is elective from a state professional association, direct cremation practitioners could be expected to organize for at least this purpose and select from among themselves their representative(s) on the state board.

This restructuring of state board membership should also allow for representation from the public at large. Both to protect against the occurrence and to dispel the appearance of professional collusion, a nonlicensed, nonpracticing public representative would add a constructive new dimension to the regulatory process.[208] A workable precedent has already been set for this practice in the states which have public representatives on their funeral boards.[209]

Obviously, if the functional responsibilities of existing licensing boards are to be expanded, their names should reflect the change. So too should the statutory titles for the laws applicable to the disposition of dead human bodies. The imagination of others could surely produce more satisfactory suggestions on this point, but one example would be to create a board of funeral and disposition services under a statutory title of the same name.

(3) The Granting of Separate Licenses.—Once the principle of a single regulatory structure to oversee the practice of funeral professionals as well as direct cremation services is accepted, the remaining issue is the substantive regulation applied to each profession. For the

(codified in part at FLA. STAT. § 11.61 (1976 Supp.)). *See also* text accompanying notes 188–193 *supra*.

208. Public representation has been called for on corporate as well as state regulatory boards. *See, e.g.*, Townsend, *A Modest Proposal: The Public Director* in CORPORATE POWER IN AMERICA 257 (R. Nader & M. Greene ed. 1973). In October, 1975, the Wisconsin Legislature passed a bill to provide for public members on various professional licensing boards under the state's Department of Regulation and Licensing. Act of Oct. 17, 1975, ch. 86, 1975 Wisc. Laws 469.

209. *See, e.g.*, ARIZ. REV. STAT. tit. 32, § 1302 (West 1976) (four licensees, two lay members); CAL. BUS. & PROF. CODE § 7601 (West Supp. 1975) (five licensees, three public members); DEL. CODE ANN. tit. 24, § 3102 (Michie 1975) (five licensees, two lay members); MASS. GEN. LAWS. ANN. ch. 13, § 29 (West 1973) (four licensees, one public member); MICH. COMP. LAWS ANN. § 338.861 (West 1976) (six licensees, one public member).

purposes of this study, the effectiveness and propriety of existing licensing systems for funeral directors and embalmers is assumed. As mentioned previously, however, those same systems are inappropriate for a direct cremation service under a functional analysis.[210] A separate license is needed for the practice of disposing of dead human bodies by cremation without accompanying funeral rites or ceremonies, with separate requirements for its issuance geared to protect the public interest with respect to the particular functions of a direct cremation service.[211]

Requirements for a license to dispose of dead human bodies by cremation could be patterned after those for a funeral director's license with the retention of most items and with appropriate adjustments made in others. One desirable change alluded to earlier would be to eliminate for direct cremation licensees the professional education and training requirements currently imposed on funeral service licensees.[212] As for requirements that should be promulgated, an applicant for a direct cremation license should be old enough to enter into legally binding contracts, and, in the interest of protecting the public health and welfare, should be required to pass a basic examination on such matters as the laws pertaining to the transportation and disposition of dead human bodies, methods for detecting signs of life, and the handling and reporting of membership fees or pre-need trust funds.

A definition of practice should delineate the authorized functions of a direct cremation licensee and should specify performance regulations with respect to the transportation, boxing, storage and, where applicable, cremation of dead human bodies. In the interest of public

210. See text accompanying notes 198–201 *supra*.

211. The attempt in Florida (see text accompanying notes 176–86 *supra*) to grant direct cremation businesses "permits" to practice, as opposed to licenses, may be attractive as a means of officially distinguishing them from funeral professionals, but such is an anomalous use of the permit power. Technically, a permit system requires only that persons register to practice an occupation. Doing business without a required automatic permit is made an offense, thus encouraging an accurate register of those engaged in the occupation. Minimum educational qualifications, competency examinations, and criteria for determining unprofessional conduct are by definition part of a licensing, not a permit, system.

212. Many occupational licensing statutes currently in force require an applicant to have at least a high school education. But a United States Supreme Court decision brings into question the functional justification and legality of such a requirement for a direct cremation licensee. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court held that the Civil Rights Act of 1964 prohibits an employer from requiring a high school education as a condition of employment unless it can be shown to be significantly related to successful job performance. Although Griggs concerned alleged racially discriminatory hiring practices by an employer, the Court's language would suggest a position that educational standards restricting occupational access, as well as employment opportunities, must "measure the person for the job, not the person in the abstract." There appears to be no job related necessity for a direct cremation service licensee to have a high school education.

health, the authorization to store a dead body should be subject to a time requirement within which cremation must be performed, and provision should be made that a body must be kept in a refrigerated facility while being held pending cremation. Other provisions pertaining to a direct cremation service's physical facilities could include requirements for the maintenance of a facility with a room equipped with a tile, cement, or composition floor, necessary drainage and ventilation, and with a refrigeration unit in which to keep a specified minimum number of dead human bodies from deteriorating before final disposition. For the most part, the restrictions on business practices enumerated in an existing funeral service licensing statute could, with appropriate modifications, reasonably apply to direct cremation licensees.

Finally, to maintain high levels of rectitude among direct cremation licensees, provision should be made for a decree of suspension or revocation of license upon a finding that the holder had misrepresented his skill or scope of practice, had demonstrated his incompetence, or had engaged in dishonorable conduct relevant to his occupation.[213] Any such finding should be made after extensive investigation and suitable proceedings involving the licensee charged with the offense.

VI. CONCLUSION

Changing attitudes toward death and a growing preference among segments of the American population for other than traditional means of disposition have produced a direct challenge to the American funeral establishment. The extent of consumer acceptance of direct cremation plans makes it clear that some purchasers of disposition services no longer wish to be limited to options that include what they consider to be expensive rituals and merchandise. It is equally clear that the days of exclusive control of the regulatory process for disposition services by licensed funeral directors and embalmers are numbered. The challenge has already been raised in two states; it is likely that more will follow.

The judicial, legislative, and administrative processes all offer potential avenues of relief for those involved in the challenge to state licensing systems for funeral directors and embalmers. A functional approach to the problem (as outlined above) would accommodate the competing interests of traditional funeral directors and direct crema-

213. The phrase "dishonorable conduct relevant to his occupation" is more meaningful than "good moral character" which is found in most licensing acts. "Bad" character is relevant only if it bears some relationship to the activity under regulation. If it has none, moral character should be ignored, whatever its significance might be in other aspects of the licensee's life.

tion services. The resultant form of regulation should protect economic freedom of choice as well as health and safety. After all, the paramount interest to be protected is not that of the competing businesses, but that of the public.